Supreme Court, U.S.
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No. 91-1988

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK LONGO, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a United States Postal Service regulation, 39 C.F.R. 232.1(h)(1), that prohibits "campaigning for election to any public office" on Postal Service property violates the First Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-16A) is reported at 953 F.2d 790. The opinion of the district court (Pet. App. 19A-65A) is reported at 761 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1992. A petition for rehearing was denied on March 9, 1992. Pet. App. 17A-18A. The petition for a writ of certiorari was filed on June 8, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, petitioner attempted to run for the United States Senate as an independent candidate from Connecticut. Pet. App. 3A. In order to qualify for a place on the ballot, he was required to collect approximately 9,800 signatures on petitions. On May 25, 1988, petitioner set up a table and chair on the off-street access walkway adjacent to the entrance of the Torrington, Connecticut Post Office to solicit signatures in support of his candidacy. *Ibid.*

The Torrington, Connecticut Post Office is located on property owned by the United States Postal Service. Pet. App. 22A-23A. The off-street access walkway is a concrete apron surrounding the Post Office building. It is located entirely on Postal Service property, and is adjacent to and leads to the entrance of the post office building. It is separated from the municipal sidewalks and streets by a parking lot, driving lanes, and garage space for postal service vehicles. *Id.* at 23A. The walkway provides the only means by which customers of the post office may travel from the parking lot to the post office building. *Ibid.*

The Postmaster informed petitioner that his actions violated a Postal Service regulation, 39 C.F.R. 232.1(h)(1), that prohibits "campaigning for election to any public office" on Postal Service property. Pet. App. 3A-4A. The postmaster showed petitioner a copy of the regulations and asked him to leave, but he refused. *Id.* at 4A. When he continued to ignore the Postmaster's requests, petitioner was arrested by the Torrington Police and charged with criminal trespass. On July 13, 1988, the charges against petitioner were dropped in exchange for his promise to cease campaign activities at the post office. *Ibid.* Petitioner nevertheless returned on four separate

occasions to solicit signatures, each time setting up a table and chair on the access walkway. Several postal patrons complained that petitioner was abusive when they refused to sign his petition or when they questioned him as to his reasons for using Postal Service property. *Id.* at 4A, 22A.

2. On August 12, 1989, petitioner filed this action in federal district court seeking declaratory and injunctive relief under 42 U.S.C. 1983. Pet. App. 4A. Petitioner alleged that the postal regulation codified at 39 C.F.R. 232.1(h)(1) was invalid, both facially and as applied, under the First Amendment to the United States Constitution. Pet. App. 4A. In April 1991, the district court granted summary judgment in petitioner's favor. *Id.* at 64A-65A. It held that the off-street access walkway was not a public forum, but concluded that the challenged regulation nevertheless violated the First Amendment because it was content-based and underinclusive. *Id.* at 50A-65A.

3. On appeal, the United States Court of Appeals for the Second Circuit reversed. Pet. App. 16A. The court declined to determine the walkway's status as a forum for First Amendment purposes, finding instead that the postal regulation at issue was a reasonable time, place, or manner restriction that could survive scrutiny even in a traditional public forum. *Id.* at 8A.

The court found that the regulation met the test for a reasonable time, place, or manner restriction because it was narrowly tailored to serve a significant government interest, left open ample alternative means of communication, and was content-neutral. Pet. App. 8A. The court held that the regulation served a significant government interest because "it enables the Postal Service to avoid both actual entanglement in partisan politics and the appearance of political favoritism." *Ibid.*; see also *id.* at 11A. The

court found the regulation narrowly tailored because it did not proscribe more speech than necessary to address the targeted evil—the danger that the Postal Service would become entangled in partisan politics. *Id.* at 11A. The court further found that adequate alternative means of communication were available because politicians remained free to campaign on the nearby municipal streets, sidewalks, and other public spaces, and to utilize the various news media and the mail. *Ibid.* Finally, the court held that, although the regulation was "somewhat based on subject matter," it did not "reflect an attempt to regulate the scope of public debate," and therefore was "sufficiently content-neutral to pass scrutiny as a reasonable time, place and manner restriction." *Id.* at 14A-15A.

The court denied a petition for rehearing and suggestion of rehearing en banc. Pet. App. 17A-18A.

ARGUMENT

The court of appeals' decision is correct and does not present any issue on which the courts of appeals are divided. Therefore, review should be denied.

1. Petitioner argues (Pet. 11) that the Court should review this case to resolve a conflict in the circuits concerning the "forum status" of an off-street postal walkway—that is, whether such a walkway is a traditional public forum or a nonpublic forum for the purpose of conducting First Amendment activities. The court below, however, did not decide that question, and there is no present conflict on it in any event. Nor is there any conflict among the circuits on the question that the court below did decide.

The court of appeals in this case held that the Postal Service regulation barring campaigning for public office on postal property, codified at 39 C.F.R. 232.1(h)(1), is consistent with the First Amendment,

regardless of the forum characterization of the off-street access walkway. To our knowledge, no other court of appeals has passed on the constitutional validity of this regulation as applied to the solicitation of signatures,[1] and petitioner does not contend otherwise. Thus, there is no conflict in the circuits on the question decided in this case.

There also is presently no conflict among the courts of appeals concerning the forum status of off-street postal walkways such as the one on which petitioner attempted to conduct his activities. Although the Fourth Circuit had held in *United States* v. *Kokinda*, 866 F.2d 699 (1989), in the course of striking down a regulation prohibiting solicitation on postal property, that a similar off-street walkway was a public forum for First Amendment purposes, that decision was reversed by this Court, see *United States* v. *Kokinda*, 110 S. Ct. 3115 (1990). To be sure, no one view of the forum status of the post office walkway in *Kokinda* garnered the support of a majority of the Court. However, the Court did reverse the only decision in which a court of appeals had held that this type of off-street postal walkway is a traditional public forum. Thus, there is currently no authority in the circuits for that proposition. Indeed, other than the Fourth Circuit in *Kokinda*, no court of appeals has ever struck down a postal regulation as violating the First Amendment, whether on the ground that the property at issue was a public forum or on any other basis.[2]

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[1] *United States* v. *Bjerke*, 796 F.2d 643, 649-650 (3d Cir. 1986), upheld 39 C.F.R. 232.1(h)(1) as applied to the solicitation of campaign contributions.

[2] In upholding the ban on solicitation that was also at issue in *Kokinda*, the Eleventh Circuit held in *United States* v. *Belsky*,

Moreover, even if the circuits were in conflict on the "forum status" of off-street postal walkways, this case would not present an occasion for addressing that issue. The court of appeals declined to decide whether the postal walkway was a public or nonpublic forum. Rather, it held that the ban on campaigning for public office was a reasonable time, place, or manner regulation that would withstand scrutiny in any forum. This Court does not ordinarily address issues not decided by the courts below. See *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990); *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1534 (1992). Because this case presents no question on which the courts of appeals are divided, certiorari should be denied.

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799 F.2d 1485, 1489 (1986), that an off-street postal walkway is not a public forum. Contrary to petitioner's contention (Pet. 9 n.2.), neither the Third nor the Ninth Circuit has held that such off-street postal walkways are "designated fora." In *United States* v. *Bjerke*, 796 F.2d 643, 649-650 (3d Cir. 1986), which concerned a challenge to the application of 39 C.F.R. 232.1(h)(1) to bar the solicitation of campaign contributions, the court specifically rejected the argument that the off-street postal walkway was a designated public forum. In *Monterey County Democratic Central Comm.* v. *United States Postal Service*, 812 F.2d 1194, 1198 (9th Cir. 1987), in considering a challenge to a regulation banning voter registration by partisan groups, the court stated that, even if it were to find that the off-street walkway at issue qualified as a "limited public forum," the regulation would still be valid. However, it did not rest its decision on the finding that the walkway was such a "designated" forum. In any event, the court's suggestion in *Monterey County* that the postal walkway might qualify as a "limited public forum" related only to its use by "specific groups to register voters." This case, in contrast, concerns the ban on campaigning for public office, to which there are no exceptions for any groups.

2. In deciding that the ban on campaigning on Postal Service property is a valid time, place, or manner restriction, the court of appeals found that the restriction met the requirement that it be "content-neutral." See *Frisby* v. *Schultz*, 487 U.S. 474, 481 (1988). After the court of appeals issued its decision, this Court decided *Burson* v. *Freeman*, 112 S. Ct. 1846 (1992). The rule challenged in *Burson* was similar to the regulation at issue here: it prohibited, *inter alia*, the display or distribution of campaign materials within 100 feet of the entrance to a polling place. All eight of the Justices who participated in *Burson* appeared to agree that the rule was content-based because it discriminated on the basis of subject matter. See 112 S. Ct. at 1850 (plurality opinion) ("[w]hether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign"); see also *id.* at 1858-1859 (Kennedy, J., concurring); *id.* at 1859 (Scalia, J., concurring in the judgment); *id.* at 1864 (Stevens, O'Connor, and Souter, JJ., dissenting).[3]

The opinions in *Burson* call into question the court of appeals' holding that the regulation banning campaigning on postal property is "content-neutral." Even if the regulation could not be regarded as "content-neutral," however, the decision to uphold the regulation would still be correct. As the government argued before this Court in *Kokinda*, see Gov't Br. 16-42, under accepted principles of forum analysis, an off-street postal walkway with the characteristics of the one at issue here is not a traditional public forum. The walkway is not a public thoroughfare, but instead leads only from the postal parking area to the post

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[3] Justice Thomas did not participate in *Burson*.

office building. It was "constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." *Kokinda*, 110 S. Ct. at 3120 (plurality opinion). See *United States* v. *Belsky*, 799 F.2d at 1489 (postal access walkway not a traditional public forum); *United States* v. *Bjerke*, 796 F.2d at 649 (same); *Monterey County Democratic Central Comm.* v. *United States Postal Service*, 812 F.2d at 1197 (same). See also *International Society for Krishna Consciousness, Inc.* v. *Lee*, No. 91-155 (June 26, 1992), slip op. 6-10 (airport terminal not public forum). The regulation banning campaigning for public office on postal property, even if not content-neutral, serves a legitimate government purpose, see Pet. App. 8A, 11A, and does not discriminate as to viewpoint. *Id.* at 15A. It is therefore a valid restriction on speech in a nonpublic forum. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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